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No. 684

Supreme Court of the United States

(OCTOBER TERM, 1948)

EULA WOLFE, nee PERRY, SALINA SCOTT, LENA McLANE, now CLARK, and MARY WALKER, nee SCOTT,
Petitioners,

VERSUS

OREN PHILLIPS and JANIE PHILLIPS, his wife, HARRY H. DIAMOND, INCORPORATED, a corporation, WALTER MAYER and BRUNO MAYER,
Respondents.

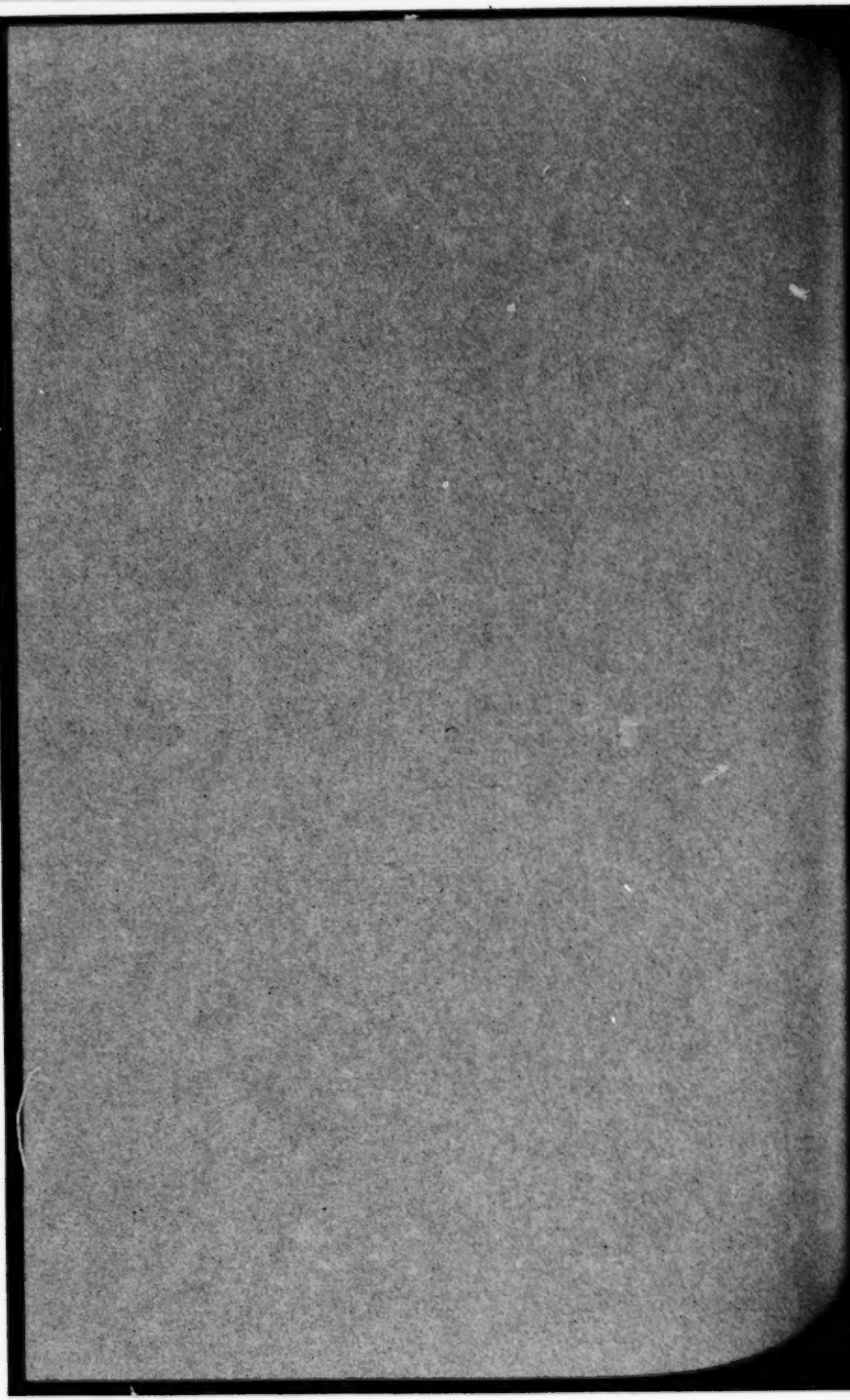
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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INDEX

PAGE

SUBJECT INDEX

Petition for Writ of Certiorari 1

Opinion Below 2

Jurisdiction 2

Questions Presented 2

A. Whether Section 2 of the Act of Congress of April 12, 1926, 44 Stat. 239, 240, should be construed as making applicable to actions by or on behalf of restricted Indians of the Five Civilized Tribes, or by the United States on behalf of such Indians, the statutes of limitations of the State of Oklahoma which were then in effect in the State of Oklahoma? 2-3

B. Whether by Section 2 of the Act of Congress of April 12, 1926, 44 Stat. 239, 240, Congress consented that the State of Oklahoma might thereafter cut off rights of action by restricted Indians of the Five Civilized Tribes, or by the United States on their behalf, to recover land, the alienation of which is restricted by Acts of Congress, by amending the state statute of limitations so as to shorten the time for bringing a suit on a pre-existing cause of action? 3

C. Whether the 1945 amendment (Session Laws of Oklahoma 1945, p. 37, Sec. 1), to the Oklahoma statute of limitations (Title 12, O. S. 1941, Sec. 93), is applicable to the cause of action asserted by the petitioners in this case? 3

D. Whether a certain judgment rendered by the District Court of Pontotoc County, Oklahoma, in a partition suit involving restricted Indian land

INDEX CONTINUED

PAGE

and a sheriff's deed executed pursuant to proceedings in partition in said suit, were void because of lack of jurisdiction of the subject matter in that court due to the pendency of administration proceedings in a probate court of the State of Oklahoma rendered necessary by the existence of certain last wills and testaments which affected the land involved? 3

Summary Statement of Matters Involved 4

Reasons Relied Upon for Issuance of Writ 7

Specifications of Error 8

Brief in Support of Petition for Writ of Certiorari 10

I. Opinion of the Court Below 10

II. Jurisdiction 10

III. Statement of the Case 12

IV. Specifications of Error 13

V. Argument 13

First Proposition: The Court of Appeals erred in holding that the cause of action of plaintiffs was barred by any Statute of Limitation 13

Second Proposition: The Court of Appeals erred in not holding that the judgment in the Partition Suit in the District Court of Pontotoc County, Oklahoma, and the Sheriff's Deed executed pursuant to Partition Proceedings therein, were void 23

Third Proposition: The Court of Appeals erred in not reversing the judgment of the District Court with directions to render judgment for plaintiffs 25

Conclusion 25

Appendix follows brief.

AUTHORITIES

PAGE

CASES CITED:

Anthis v. Drew, 123 Okla. 18, 252 Pac. 11 15

Baldridge v. Caulk, 110 Okla. 185, 237 Pac. 453 14
Bilby v. Noble, 106 Okla. 302, 234 Pac. 198 24
Board of Commissioners of Jackson County, Kansas, v. United States, 308 U. S. 343, 84 L. Ed. 313, 60 Sup. Ct. 285 ..... 12, 17, 18
Board of Commissioners of Tulsa County v. U. S., 94 Fed. (2d) 450 18
Bryan County v. U. S., 123 Fed. (2d) 782, certiorari denied, 315 U. S. 819 18

Chesapeake & Delaware Canal Co. v. United States, 250 U. S. 123, 63 L. Ed. 889, 39 Sup. Ct. 407 ..... 12, 17
Cowokochee v. Chapman, 90 Okla. 121, 215 Pac. 759 24

Dawes v. Brady, 112 Okla. 289, 241 Pac. 147 15
Dierks v. Isaac, 114 Okla. 158, 244 Pac. 750 22

Franklin v. United States, 216 U. S. 559, 54 L. Ed. 615, 30 Sup. Ct. 434 21

Gassin v. McJunkin, 173 Okla. 210, 48 Pac. (2d) 320 24
Grisso v. United States, 138 Fed. (2d) 996 ..... 23, 25

Hatcher et al. v. Wade's Estate, 180 Okla. 646, 71 Pac. (2d) 962 24
Hollister v. U. S., 145 Fed. 773 (C. C. A. 8, 1906) 21
Homer v. Lester, 95 Okla. 284, 219 Pac. 392 19

Independent Coal and Coke Co. v. United States, 274 U. S. 640, 71 L. Ed. 1270, 47 Sup. Ct. 714 ..... 12, 17

Jackson v. Harris, 43 Fed. (2d) 513 21

Malone v. Wamsley, 80 Okla. 181, 195 Pac. 484 19
March v. Peter, 179 Okla. 207, 64 Pac. (2d) 912 24
McLish v. White, 97 Okla. 150, 223 Pac. 348 15

INDEX CONTINUED

PAGE

Micco's Estate, In re, 59 Fed. Supp. 434 24
Moore v. Harjo, 144 Fed. (2d) 318 (C. C. A. 10, 1944) 14
Moore v. Jefferson, 190 Okla. 67, 120 Pac. (2d) 983 24
Muskogee County v. U. S., 133 Fed. (2d) 61, certiorari denied, 319 U. S. 475 18

Panama Refining Co. et al. v. Ryan et al., 293 U. S. 388, 55 Sup. Ct. 241, 79 L. Ed. 446 21
Patterson v. Carter, 83 Okla. 70, 200 Pac. 855 14
People of Puerto Rico v. Shell Company, 302 U. S. 253, 266, 82 L. Ed. 235, 58 Sup. Ct. 167 21

Rodgers v. Darks, 193 Okla. 297, 142 Pac. (2d) 988 17

Silmon v. Rahhal, 178 Okla. 244, 62 Pac. (2d) 501 25
Simms v. Hendricks, 172 Okla. 532, 45 Pac. (2d) 746 23
Sockey v. Ellis, 112 Okla. 116, 240 Pac. 87 21
State ex rel. Morrell v. Worten, District Judge, 161 Okla. 130, 17 Pac. (2d) 424 23
State ex rel. Miller v. Huser, 76 Okla. 130, 184 Pac. 713 19
Stewart v. Keyes, 295 U. S. 403, 55 Sup. Ct. 807, 79 L. Ed. 1507 (affirming Stewart v. Keyes, 167 Okla. 531, 30 Pac. [2d] 875) 22

Tobley v. Dekinder, 110 Okla. 63, 237 Pac. 67 14
Tucker v. Masters, 97 Okla. 70, 222 Pac. 259 24

U. S. v. Anglin et al., 145 Fed. (2d) 622, 627 24
United States v. 7,405.3 Acres of Land et al., 97 Fed. (2d) 417 16
United States v. Bartron, 35 Fed. (2d) 765, 769 (D. C. South Dakota) 18
U. S. v. Board of Commissioners of Tulsa County, 19 Fed. Supp. 635 18
U. S. v. Bond, 108 Fed. (2d) 504 24
United States v. Hellard, 322 U. S. 363, 88 L. Ed. 1326, 64 Sup. Ct. 985 23
United States v. Miller, 28 Fed. (2d) 846 19

INDEX CONTINUED

PAGE

U. S. v. Minnesota, 270 U. S. 181, 70 L. Ed. 539, 46 Sup. Ct. 298 ..... 11, 17
United States v. Nashville, Chattanooga and St. Louis Ry. Co., 118 U. S. 120, 30 L. Ed. 81, 6 Sup. Ct. 1006 ..... 11, 17
United States v. Paul, 6 Peters 141, 8 L. Ed. 348 21
United States v. Press Publishing Company, 219 U. S. 1, 8, 55 L. Ed. 65, 30 Sup. Ct. 434, 21 Ann. Cas. 942 21
United States v. Summerlin, 310 U. S. 414, 84 L. Ed. 1283, 60 Sup. Ct. 1019 ..... 12, 17
United States v. Thompson, 98 U. S. 486, 25 . Ed. 194 ..... 11, 17
United States v. Whited & Wheless, 246 U. S. 552, 62 L. Ed. 879, 38 Sup. Ct. 367 ..... 12, 17

Wolfe v. Gills, 96 Okla. 6, 219 Pac. 350 24

STATUTES:

Act of Congress of April 26, 1906, Sec. 23, 34 Stat. 137 4
Act of Congress of May 27, 1908, Sec. 8, 35 Stat. 312 ..... 5, 12, 22
Act of June 14, 1918 (40 Stat. 606, 25 U. S. C., Sec. 355) 23
Act of Congress of April 12, 1926, Sec. 3 (44 Stat. 239) 4, 7, 11, 16
Act of Congress of May 10, 1928 (45 Stat. 495) 12
Act of Congress of January 27, 1933 (47 Stat. 777) 12
Act of Congress of August 4, 1947 (Public Law 336, 80th Congress) 12, 19
Assimilative Crimes Act, 18 U. S. C., Sec. 468 20

Title 12, O. S. 1941, Sec. 93 13
58 Okla. Stat., Secs. 641, 642, 649 24

Revised Laws of Oklahoma, 1910, Sec. 4655 13-14

INDEX CONTINUED

PAGE

(Session Laws of Oklahoma 1945, p. 37, Sec. 1), Oklahoma Statute of Limitations (12 O. S. 1941, Sec. 93, Revised Laws of Oklahoma, 1910, Sec. 4655) 7

MISCELLANEOUS:

16 C. J. S. Const. Law, Sec. 136 21

26 C. J. S., Title, Descent and Distribution, Sec. 61, p. 1085 22

Judicial Code, 1948 (28 U. S. C., Sec. 1254) 2, 10

Judicial Code, 1948 (28 U. S. C., Sec. 2101) 2, 11

Oklahoma Constitution, Article 7, Secs. 12, 13 24

Rule 38, Rules of Supreme Court United States, Sec. 5(b) 2

No. ———

Supreme Court of the United States

(October Term, 1948)

Eula Wolfe, *nee* Perry, Salina Scott, Lena McLane, now Clark, and Mary Walker, *nee* Scott,
Petitioners,

VERSUS

Oren Phillips and Janie Phillips, his wife, Harry H. Diamond, Incorporated, a corporation, Walter Mayer and Bruno Mayer,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION FOR WRIT OF CERTIORARI

The petitioners, Eula Wolfe, nee Perry, Salina Scott, Lena McLane, now Clark, and Mary Walker, *nee* Scott, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in the certain case therein entitled, "Eula Wolfe *nee* Perry, Salina Scott, Lena McLane now Clark and Mary Walker *nee* Scott, Appellants, vs. Oren Phillips and Janie Phillips, his wife, Harry H. Diamond Incorporated, a corporation, Walter Mayer and Bruno Mayer, Appellees," same being case numbered 3740 therein. The judgment in that court

was entered on January 27, 1949. The decision has not yet been reported but is shown in the printed transcript of record filed herewith.

OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit is set forth in the record and is copied in the appendix to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1254 of the 1948 Judicial Code (28 U. S. C., Sec. 1254), and is filed within 90 days after the entry of the judgment of the Court of Appeals in accordance with Section 2101 of the 1948 Judicial Code (28 U. S. C., Sec. 2101), and is made pursuant to Section 5(b) of Rule 38 of the rules of this Court, and more particularly the part thereof which indicates that a writ of certiorari may issue to a Court of Appeals where it has decided an important question of Federal law which has not been, but should be, settled by this Court, or has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

QUESTIONS PRESENTED

A.

Whether Section 2 of the Act of Congress of April 12, 1926, 44 Stat. 239, 240, should be construed as making applicable to actions by or on behalf of restricted Indians

of the Five Civilized Tribes, or by the United States on behalf of such Indians, the statutes of limitations of the State of Oklahoma which were then in effect in the State of Oklahoma?

B.

Whether by Section 2 of the Act of Congress of April 12, 1926, 44 Stat. 239, 240, Congress consented that the State of Oklahoma might thereafter cut off rights of action by restricted Indians of the Five Civilized Tribes, or by the United States on their behalf, to recover land, the alienation of which is restricted by Acts of Congress, by amending the state statute of limitations so as to shorten the time for bringing a suit on a pre-existing cause of action?

C.

Whether the 1945 amendment (Session Laws of Oklahoma 1945, p. 37, Sec. 1), to the Oklahoma statute of limitations (Title 12, O. S. 1941, Sec. 93), is applicable to the cause of action asserted by the petitioners in this case?

D.

Whether a certain judgment rendered by the District Court of Pontotoc County, Oklahoma, in a partition suit involving restricted Indian land and a sheriff's deed executed pursuant to proceedings in partition in said suit, were void because of lack of jurisdiction of the subject matter in that court due to the pendency of administration proceedings in a probate court of the State of Oklahoma rendered necessary by the existence of certain last wills and testaments which affected the land involved?

SUMMARY STATEMENT OF MATTERS INVOLVED

This action was commenced in the District Court of Pontotoc County, Oklahoma, on the 3rd day of January, 1947 (R. 1-22, 49, 70), by petitioners as plaintiffs against respondents as defendants, to recover possession of, and quiet title to a certain tract of land, and for a judgment for damages for loss of use and occupation of the land.

Notice of pendency of the action was served upon the Superintendent for the Five Civilized Tribes in Oklahoma pursuant to the provisions of Section 3 of the Act of Congress of April 12, 1926 (44 Stat. 239) (R. 22), and the action was thereafter removed to the United States District Court for the Eastern District of Oklahoma upon the petition of the United States (R. 27). After the removal of the case, the United States filed a complaint in intervention on behalf of petitioners (R. 28), but before the case was tried, was granted leave to and did withdraw its complaint in intervention (R. 44), and thereafter took no further part in this case.

The plaintiffs (petitioners here) deraigned title as follows (R. 1-9):

The land was allotted and patented to Mollie Henderson, an enrolled full-blood Chickasaw Indian, as her homestead allotment, and was restricted and tax exempt during her life. She died February 9, 1935, while the owner of and in possession of the land, while a resident of Pontotoc County, Oklahoma. She left a will which had been acknowledged before and approved by a United States Commissioner (in accordance with Section 23 of the Act of Congress of April 26, 1906, 34 Stat. 137, as amended by

Section 8 of the Act of Congress of May 27, 1908, 35 Stat. 312), by which the land was devised to her husband, Ainusiah McLane, and her two sons, King McLane and George McLane, in equal shares. Each of the devisees of the allottee was a full-blood Chickasaw Indian. Such will was admitted to probate by the County Court of Pontotoc County, Oklahoma, on August 31, 1935 (R. 50). Ainusiah McLane died testate April 22, 1935, while the owner of an undivided one-third interest in the land, and left an approved will, by which such interest in the land was devised to the plaintiff, Mary Walker, *nee* Scott, a three-fourths blood Chickasaw, Roll No. 1062. The will of Ainusiah McLane was admitted to probate by order of the County Court of Pontotoc County, Oklahoma, on February 11, 1936 (R. 51). Thereafter, King McLane and George McLane both died intestate, and thereafter Beulah Scott, one of the heirs of King McLane and George McLane, died intestate and said deceased persons who died intestate left certain heirs mentioned in the opinion of the Court of Appeals, and plaintiffs claim title by reason of such devises and intestate successions. The plaintiffs are all Chickasaw Indians of one-half or more degree of Indian blood.

The respondents (defendants below), other than Walter and Bruno Mayer, claim title by reason of a sheriff's deed executed pursuant to partition proceedings in the District Court of Pontotoc County, Oklahoma, on November 25, 1936 (R. 55), such sheriff's deed having been filed for record with the County Clerk of Pontotoc County, Oklahoma, on November 25, 1936 (R. 55). In such partition suit in the District Court of Pontotoc County, Oklahoma, same being case No. 14157 therein, Mary Walker and King McLane were plaintiffs, and George McLane, a minor, was

the defendant (R. 73). It was commenced on April 23, 1936 (R. 73), and judgment was rendered in such case on May 8, 1936 (R. 56). At all times during the pendency of such partition suit in the District Court of Pontotoc County, Oklahoma, the administration proceedings upon the estate of the allottee, Mollie Henderson, and also upon the estate of Ainusiah McLane were pending in the County Court of Pontotoc County, Oklahoma, and valid final decrees of distribution were not rendered or entered in such probate proceedings until September 10, 1942 (R. 73). In plaintiff's original petition in this case in the District Court of Pontotoc County, Oklahoma, it was alleged that the judgment in the partition suit was void because indispensable parties were omitted from said suit (R. 7, 8). Plaintiffs filed an amendment to their petition in the District Court of Pontotoc County, Oklahoma, in which it was alleged that the guardian of the minor defendant in the partition suit was the actual purchaser of the land at the sheriff's sale (R. 23). After the removal of the case to the Federal Court, the plaintiffs filed a second amendment to their petition, wherein it was alleged that the judgment in the partition suit in the District Court of Pontotoc County, Oklahoma, and all proceedings based thereon, were void because of the pendency of the administration proceedings in the County Court of Pontotoc County, Oklahoma, involving the entire interest in the land, which were rendered necessary by reason of the above mentioned wills, and that by reason thereof the District Court of Pontotoc County, Oklahoma, did not have jurisdiction to entertain such partition suit (R. 41). The trial court held that plaintiffs' cause of action was barred by the 1945 Amendment

(Session Laws of Oklahoma 1945, p. 37, Sec. 1) of the Oklahoma Statute of Limitations (12 O. S. 1941, Sec. 93, Revised Laws of Oklahoma, 1910, Sec. 4655), and that such 1945 Amendment to the Oklahoma Statute of Limitations was applicable by reason of the provisions of Section 2 of the Act of Congress of April 12, 1926 (44 Stat. 239, 240), and rendered judgment against the plaintiffs (R. 76, 80). The plaintiffs appealed to the United States Court of Appeals for the Tenth Circuit, which likewise held that such 1945 Amendment to the Oklahoma Statute of Limitations is applicable and affirmed the judgment of the United States District Court for the Eastern District of Oklahoma. Other facts are set forth in the opinion of the Court of Appeals, which is attached as an appendix to this petition and brief in support thereof.

REASONS RELIED UPON FOR ISSUANCE OF WRIT

1. The question involved as to the applicability of the 1945 Amendment to the Oklahoma Statute of Limitations in this case is one of Federal law which has not been, but should be, settled by this Court. By such 1945 Amendment the Oklahoma Legislature attempted to cut off many causes of action by restricted Indians, or by the United States on behalf of restricted Indians, for recovery of restricted Indian land by shortening time to bring suit for recovery of land sold at void partition suit sales. This question involves a construction of Section 2 of the Act of Congress of April 12, 1926 (44 Stat. 239, 240).

2. The decision of the United States Court of Appeals for the Tenth Circuit in this case is probably in conflict with applicable decisions of this Court cited and dis-

cussed in the brief filed herewith as to the power of a State to enact a statute of limitations against the United State of America, or against restricted Indians as to lands subject to restrictions on alienation imposed by Acts of Congress in cases where the United States could sue on their behalf.

SPECIFICATIONS OF ERROR

1. The United States Court of Appeals for the Tenth Circuit erred in holding that the cause of action of the plaintiffs in this case (petitioners herein), was barred by any statute of limitations of the State of Oklahoma.

2. The Court of Appeals erred in not holding that the sheriff's deed in partition under which the respondents claim title to the land involved, was void.

3. The Court of Appeals erred in not reversing the judgment of the United States District Court for the Eastern District of Oklahoma with directions to render judgment for plaintiffs (petitioners herein), for recovery of the land involved.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue out of this Honorable Court directed to the United States Court of Appeals for the Tenth Circuit, in order for this Court to review the judgment of that court in case No. 3740 therein, entitled "Eula Wolfe *nee* Perry, Salina Scott, Lena McLane now Clark and Mary Walker *nee* Scott, Appellants, vs. Oren Phillips and Janie Phillips, his wife, Harry H. Diamond, Incorporated, a corporation, Walter Mayer and Bruno Mayer, Appellees," and that the decision and judgment of said Court of Appeals

be reviewed by this Court, and that the judgment of said Court of Appeals be reversed, and for such other and further relief as this Court may deem proper.

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Of Counsel:

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No. ———

Supreme Court of the United States
(October Term, 1948).

Eula Wolfe, *nee* Perry, Salina Scott, Lena McLane, now Clark, and Mary Walker, *nee* Scott,
Petitioners,

VERSUS

Oren Phillips and Janie Phillips, his wife, Harry H. Diamond, Incorporated, a corporation, Walter Mayer and Bruno Mayer,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit in this case has not been reported but is included in the record and a copy of the same is attached to the petition for writ of certiorari and this brief in support thereof as an appendix. The District Court did not write an opinion.

II.

JURISDICTION

1. The jurisdiction of this Court is invoked under Section 1254 of the 1948 Judicial Code (28 U. S. C., Sec.

1254), and Section 2101 of the 1948 Judicial Code (28 U. S. C., Sec. 2101).

2. The petition for writ of certiorari is to obtain a review of the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, dated January 27, 1949.

3. This case involves a question of the proper construction to be placed upon Section 2 of the Act of Congress of April 12, 1926 (44 Stat. 239, 240), which is a question of Federal law which has not been, but should be, settled by a decision of this Court.

4. The decision of the United States Court of Appeals for the Tenth Circuit is in conflict with applicable decisions of this Court holding that any statute of limitations against the United States must be based on Federal law, and that any law imposing a statute of limitations against the United States is to be strictly and narrowly construed, and that the immunity of the United States from the operation of any particular state statute of limitations must be expressly waived, the cause of action asserted by the petitioners herein being one that could be brought by the United States on their behalf.

—*United States* v. *Minnesota*, 270 U. S. 181, 70 L. Ed. 539, 46 Sup. Ct. 298;

United States v. *Nashville, Chattanooga and St. Louis Ry. Co.*, 118 U. S. 120, 30 L. Ed. 81, 6 Sup. Ct. 1006;

United States v. *Thompson*, 98 U. S. 486, 25 L. Ed. 194;

Chesapeake & Delaware Canal Co. v. *United States,* 250 U. S. 123, 63 L. Ed. 889, 39 Sup. Ct. 407;

Independent Coal and Coke Co. v. *United States,* 274 U. S. 640, 71 L. Ed. 1270, 47 Sup. Ct. 714;

United States v. *Whited & Wheless,* 246 U. S. 552, 62 L. Ed. 879, 38 Sup. Ct. 367;

United States v. *Summerlin,* 310 U. S. 414, 84 L. Ed. 1283, 60 Sup. Ct. 1019;

Board of Commissioners of Jackson County, Kansas, v. *United States,* 308 U. S. 343, 84 L. Ed. 313, 60 Sup. Ct. 285.

III.

STATEMENT OF THE CASE

Reference is made to the statement of the case contained in the petition for writ of certiorari. The mineral deed (mentioned in the opinion of the Court of Appeals) from Mary Walker, *nee* Scott, to W. J. Mayer and Bruno Mayer, dated January 6, 1936, purporting to convey an undivided one-sixth interest in the mineral rights, not having been approved by any County Court or by the Secretary of the Interior, was executed in violation of the restrictions on alienation imposed by the first section of the Act of Congress of January 27, 1933 (47 Stat. 777), and was void, and should be cancelled. The land involved has at all times been restricted Indian land under the Acts of Congress of May 27, 1908 (35 Stat. 312), May 10, 1928 (45 Stat. 495), January 27, 1933 (47 Stat. 777), August 4, 1947 (Public Law 336, 80th Congress).

IV.

SPECIFICATIONS OF ERROR

1. The United States Court of Appeals for the Tenth Circuit erred in holding that the cause of action of the plaintiffs in this case (petitioners herein) was barred by any statute of limitations of the State of Oklahoma.

2. The Court of Appeals erred in not holding that the sheriff's deed in partition under which the respondents claim title to the land involved, was void.

3. The Court of Appeals erred in not reversing the judgment of the United States District Court for the Eastern District of Oklahoma with directions to render judgment for the plaintiffs (petitioners herein) for recovery of the land involved.

V.

ARGUMENT

First Proposition.

The Court of Appeals erred in holding that the cause of action of plaintiffs was barred by any Statute of Limitation.

Petitioners contend that the only applicable statute of limitations to such a cause of action as is asserted by them is subdivision 4 of Section 93, Oklahoma Statutes, 1941. Section 93 of Title 12, O. S. 1941, was the same as Section 4655 of the Revised Laws of Oklahoma, 1910, and was not amended by the Oklahoma Legislature until March 30, 1945. Before the 1945 amendment, it provided (in part) as follows:

"Actions for the recovery of real property, or for the determination of any adverse right or interest therein, can only be brought within the periods hereinafter prescribed, after the cause of action shall have accrued, and at no time thereafter:

"1. An action for the recovery of real property sold on execution, brought by the execution debtor, his heirs, or any person claiming under him, by title acquired after the date of the judgment, within five years after the date of the recording of the deed made in pursuance of the sale.

* * * * * * * *

"4. An action for the recovery of real property not hereinbefore provided for, within fifteen years * * *."

The 1945 amendment which was applied against the plaintiffs is set forth in the opinion of the Court of Appeals. It was to the first subdivision of Section 93 of Title 12, only. Before such amendment, the only applicable limitation period for recovery of real estate sold or conveyed pursuant to partition proceedings was fifteen years, as provided in subdivision 4 of Section 93. *Moore* v. *Harjo*, 144 Fed. (2d) 318 (C. C. A. 10, 1944).

At the time of the enactment of the Act of Congress of April 12, 1926, it had been held that the statute of limitations of the State of Oklahoma did not run against the cause of action by an Indian to recover his restricted land, so long as restrictions upon alienation existed.

—*Patterson* v. *Carter*, 83 Okla. 70, 200 Pac. 855;
Baldridge v. *Caulk*, 110 Okla. 185, 237 Pac. 453;
Tobley v. *Dekinder*, 110 Okla. 63, 237 Pac. 67;

McLish v. *White*, 97 Okla. 150, 223 Pac. 348;
Dawes v. *Brady*, 112 Okla. 289, 241 Pac. 147;
Anthis v. *Drew*, 123 Okla. 18, 252 Pac. 11.

This was so because the United States could bring suit for the benefit of an Indian to recover his restricted Indian land, and was not bound by any state statute of limitation, and the courts would not attempt to impose any statute of limitation against the Indian in a suit by him which could not be interposed against the United States in any suit by the Government for the benefit of an Indian. The Government dropped out of this case, after obtaining its removal to the Federal Court, but that does not determine what position the Government will take in the next similar case, and the plaintiffs in this case are entitled to any immunity from the operation of any state statute of limitation which the Government would be entitled to, if it had not withdrawn its complaint in intervention. If this were not true, certain governmental officials would have the power to decide the fate of different suits by different Indians, even though the Indians were prosecuting their own actions, and the measure of justice would not be uniform to those in similar situations. Another reason for the rule that the statute of limitation did not run against the cause of action by an Indian to recover his restricted land, so long as restrictions on alienation existed, was that to apply the statute of limitations in such a case would effect an unauthorized alienation of restricted land in violation of the Acts of Congress imposing restrictions.

The cases above cited show that if it had not been for the Act of Congress of April 12, 1926, there could not

possibly have been any defense founded on adverse possession or any state statute of limitation, as against the right of the Indian heirs and devisees in this case. The state statute of limitation could not possibly have run, except insofar as any state statute of limitation is put in force by the Act of Congress of April 12, 1926, *supra*, as against the right of the United States to sue for the benefit of any restricted Indian, or as against the right of any of the restricted Indian plaintiffs in this case.

> —*United States* v. *7,405.3 Acres of Land et al.*, 97 Fed. (2d) 417.

Section 2 of the Act of Congress of April 12, 1926, 44 Stat. 239, 240, *supra*, is set forth in the opinion of the Court of Appeals, which is attached to this brief as an appendix, and in the opening clause thereof, provided:

> "The statutes of limitations of the State of Oklahoma *are hereby made* and declared to be applicable to and shall have full force and effect against all restricted Indians of the Five Civilized Tribes * * *."

Such opening clause established the subject of the entire sentence and section. Petitioners contend it necessarily referred only to the statutes of limitations of the State of Oklahoma then existing and that the remaining language in the section referred to the same statutes of limitations mentioned in the opening clause of the section above quoted, and that it cannot be presumed, in view of the language used, that Congress by said Act consented for the state to, at any time in the future, cut off rights of action by the United States, or by restricted Indians for whose benefit the United States could sue, by shortening

the time to bring suit, and so, petitioners contend that the 1945 amendment to the Oklahoma statute does not apply to this case.

If the United States or a restricted Indian for whose benefit the United States could bring suit would be subject to a statute of limitation, such statute would have to be based on Federal law. State statutes of limitations do not have any application.

—*U. S.* v. *Minnesota*, 270 U. S. 181, 70 L. Ed. 539, 46 Sup. Ct. 298;

U. S. v. *Thompson*, 98 U. S. 486, 25 L. Ed. 194;

U. S. v. *Nashville, Chattanooga and St. Louis Ry. Co.*, 118 U. S. 120, 30 L. Ed. 81, 6 Sup. Ct. 1006;

Chesapeake & Delaware Canal Co. v. *U. S.*, 250 U. S. 123, 63 L. Ed. 889, 39 Sup. Ct. 407;

Board of Commissioners of Jackson County, Kansas, v. *U. S.*, 308 U. S. 343, 84 L. Ed. 313, 60 Sup. Ct. 285;

U. S. v. *Summerlin*, 310 U. S. 414, 84 L. Ed. 1283, 60 Sup. Ct. 1019.

Any law imposing a statute of limitation against the United States is to be narrowly and strictly construed.

—*Independent Coal and Coke Co.* v. *U. S.*, 274 U. S. 640, 71 L. Ed. 1270;

Jackson County v. *U. S., supra;*

U. S. v. *Whited & Wheless*, 246 U. S. 552, 62 L. Ed. 879, 38 Sup. Ct. 367;

Rodgers v. *Darks*, 193 Okla. 297, 142 Pac. (2d) 988.

Section 2 of the Act of Congress of April 12, 1926, has already been narrowly construed (in regard to another point) in the cases of *Board of Commissioners of Tulsa County* v. *U. S.*, 94 Fed. (2d) 450, affirming *U. S.* v. *Board of Commissioners of Tulsa County*, 19 Fed. Supp. 635; *Bryan County* v. *U. S.*, 123 Fed. (2d) 782, certiorari denied, 315 U. S. 819; *Muskogee County* v. *U. S.*, 133 Fed. (2d) 61, certiorari denied, 319 U. S. 475.

In the case of *United States* v. *Bartron*, 35 Fed. (2d) 765, 769 (D. C. South Dakota), it was held:

> "Statutes of limitations do not run against the government, and it is not bound by any statute of limitation, unless Congress has clearly manifested its intention to apply *a specific limitation* to the government; * * * ."

This Court held practically the same thing in the case of *Jackson County* v. *United States, supra*, wherein it was held:

> "The state will not be allowed to invade the immunities of Indians, no matter how skillful its legal manipulations. *United States* v. *Rickert*, 188 U. S. 432, 47 L. ed. 532, 23 S. Ct. 478. *Cf. Bunch* v. *Cole*, 263 U. S. 250, 68 L. Ed. 290, 44 S. Ct. 101. * * * Again, state notions of laches and state statutes of limitations have no applicability to suits by the Government, whether on behalf of Indians or otherwise. *United States* v. *Minnesota*, 270 U. S. 181, 70 L. Ed. 539, 46 Sup. Ct. 298, *Cf. Chesapeake & D. Canal Co.* v. *United States*, 250 U. S. 123, 63 L. ed. 889, 39 Sup. Ct. 407. This is so because the immunity of the sovereign from these defenses is historic. Unless *expressly waived*, it is implied in all federal enactments."

Petitioners contend that there can be no express waiver by Congress of the immunity of the United States from the operation of a state statute of limitations, without knowledge of the material facts or without knowledge of what is being waived, or as to what statute of limitation the immunity is to be withdrawn or waived, and that Section 2 of the Act of April 12, 1926, should not be construed as consenting in advance to the operation against the Government and its restricted Indian wards of such statutes of limitations as might be thereafter enacted by the State of Oklahoma. This might nearly completely disrupt the policy of Congress to keep certain Indian lands restricted for the benefit and protection of the Indians, because it is unknown what radical changes the State may make in its statutes of limitations in the future. The State of Oklahoma cannot enact a statute of limitation or other law, which is in conflict with Acts of Congress prescribing the manner of alienation of restricted Indian land, which will have any effect. *Malone* v. *Wamsley*, 80 Okla. 181, 195 Pac. 484; *State ex rel. Miller* v. *Huser*, 76 Okla. 130, 184 Pac. 713; *Homer* v. *Lester*, 95 Okla. 284, 219 Pac. 392. And see *United States* v. *Miller*, 28 Fed. (2d) 846, holding that the Government of the United States cannot be hampered, impeded, or defeated in the exercise of its powers by state legislation.

The guardianship of the United States over the Indians still continues. Notice the Act of Congress of August 4, 1947 (Public Law 336, 80th Congress), imposing additional restrictions on alienation of lands of heirs or devisees of the Five Civilized Tribes. It cannot be presumed that by Section 2 of the Act of Congress of April 12, 1926,

supra, Congress attempted to delegate to the Oklahoma Legislature the power to pass laws in the future which would cut off rights of action by the United States or by restricted Indians in cases where the United States could sue for them, and thus transfer title to restricted Indian land in a manner not authorized by Federal Law.

The plaintiffs had until November 25, 1951, to bring this suit, if adverse possession commenced when the sheriff's deed was filed for record on November 25, 1936. The 1945 Amendment to the Oklahoma statute purported to allow one year after the passage of the Act of March 30, 1945, to bring the suit.

We think that when Congress delegates to the Legislature of the State of Oklahoma the power to, in the future, at the will of the Legislature of the State, cut off rights of action by the United States which the Government might wish to take for the enforcement of the Federal laws on behalf of restricted Indians of the Five Civilized Tribes, or rights of action by Indians to recover restricted land, that, then Congress will have determined that there is no further need for any restrictions on alienation of lands of these Indians, and will have repealed all of the laws providing for such restrictions.

The statute which was known as the Assimilative Crimes Act (18 U. S. C., Sec. 468, prior to enactment of new 1948 Criminal Code), making an act a Federal crime if committed on a Federal reservation if it would be a crime by the law of the state in which such reservation was situated, was consistently construed to refer only to

state laws in effect at the time of the passage of such Federal law, and to adopt them by reference as Federal laws.

—*United States* v. *Paul*, 6 Peters 141, 8 L. Ed. 348;

Franklin v. *United States*, 216 U. S. 559, 54 L. Ed. 615, 30 Sup. Ct. 434;

United States v. *Press Publishing Company*, 219 U. S. 1, 8, 55 L. Ed. 65, 30 Sup. Ct. 434, 21 Ann. Cas. 942;

People of Puerto Rico v. *Shell Company*, 302 U. S. 253, 266, 82 L. Ed. 235, 58 Sup. Ct. 167.

In the case of *Hollister* v. *U. S.*, 145 Fed. 773 (C. C. A. 8, 1906), a very similarly worded statute to the one involved herein was so construed.

Congress cannot delegate its own legislative powers to the state legislatures, nor adopt prospectively such laws as the states may thereafter pass on any particular subject (16 C. J. S. Const. Law, Sec. 136; *Panama Refining Co. et al.* v. *Ryan et al.*, 293 U. S. 388, 55 Sup. Ct. 241, 79 L. Ed. 446; *Hollister* v. *United States, supra*).

The cases of *Sockey* v. *Ellis*, 112 Okla. 116, 240 Pac. 87, and *Jackson* v. *Harris*, 43 Fed. (2d) 513, which were cited in the opinion of the Court of Appeals, and which dealt with the effect of Congress providing that the devotion of land by intestate succession would be in accordance with the law of descent and distribution of the state, are not analogous to the situation in the case at bar. In those cases the amendments to the Oklahoma statute of descent which were applied were enacted before the ancestor died, and no person whose interests the Govern-

ment could protect was injured or deprived of anything, because a prospective or expectant heir does not have any interest in property he may subsequently inherit (26 C. J. S., Title, Descent and Distribution, Sec. 61, p. 1085). But in this case, the petitioners and the Government had a cause of action which the Oklahoma Legislature attempted to cut off by the 1945 amendment to the statute of limitation. Permitting the local law of inheritance to determine the heirs of a person is in the nature of things not necessarily adopting such law as a Federal law, but, petitioners contend that as to a matter so vital as the right to bar the Government, or restricted Indians for whom the Government could sue, by a statute of limitations, it is necessary that there be a Federal statute of limitations, or the adoption by Congress of a specific statute of limitations.

The case of *Stewart* v. *Keyes*, 295 U. S. 403, 55 Sup. Ct. 807, 79 L. Ed. 1507 (affirming *Stewart* v. *Keyes*, 167 Okla. 531, 30 Pac. [2d] 875), is distinguishable from the case at bar. It was held in that case that under the provisions of the Act of Congress of May 27, 1908, 35 Stat. 312, and prior acts, inherited lands of minors and incompetents, sold at guardian's sales, were not restricted lands, and that, therefore, the statute of limitations against recovery of land sold at probate sales by guardians ran, even before the Act of April 12, 1926, *supra*, following the case of *Dierks* v. *Isaac*, 114 Okla. 158, 244 Pac. 750. It was apparently conceded that inherited land of full-blood heirs, not sold at guardian's sale, restricted by the first proviso in Section 9 of the Act of May 27, 1908, was restricted land, and the land involved in this case has at all times been restricted land, under the Acts of May 27, 1908, May 10,

1928, January 27, 1933, and August 4, 1947, *supra*, and, we contend, the cause of action of petitioners for recovery of such land, asserted in this case, cannot be barred by any specific state statute of limitations which Congress has not clearly manifested an intention to allow to be applicable.

In case of void partition proceedings, void judgment, and void sale, which did not divest the Indians of title to the land, the second section of the Act of June 14, 1918 (40 Stat. 606, 25 U. S. C., Sec. 355), could not operate to relieve the land of restrictions. *United States* v. *Hellard*, 322 U. S. 363, 88 L. Ed. 1326, 64 Sup. Ct. 985; *Grisso* v. *United States*, 138 Fed. (2d) 996.

Second Proposition.

The Court of Appeals erred in not holding that the judgment in the Partition Suit in the District Court of Pontotoc County, Oklahoma, and the Sheriff's Deed executed pursuant to Partition Proceedings therein, were void.

It was held by the Supreme Court of Oklahoma in the cases of *State ex rel. Morrell* v. *Worten, District Judge*, 161 Okla. 130, 17 Pac. (2d) 424, and *Simms* v. *Hendricks*, 172 Okla. 532, 45 Pac. (2d) 746, that a District Court of the State of Oklahoma did not have jurisdiction to entertain a suit to partition realty of a decedent over which a County Court had jurisdiction in connection with the settlement of an estate. The partition suit in the District Court was commenced while the administration proceedings upon

the estates of the allottee, Mollie McLane, *nee* Henderson, and Ainusiah McLane were pending in the County Court, and before valid decrees of distribution of the respective estate had been made (R. 73). In the Matter of the Estate of Mollie McLane, *nee* Henderson, deceased, involving the entire interest in the land, the County Court had jurisdiction to direct the partition of the land in the course of the administration and settlement of the estate (*U. S.* v. *Bond,* 108 Fed. [2d] 504; 58 Okla. Stat. Secs. 641, 642, 649; Oklahoma Constitution, Article 7, Secs. 12, 13).

If the allottee had died intestate, then her restricted land would not have been subject to administration in proceedings on her estate (*Wolfe* v. *Gills,* 96 Okla. 6, 219 Pac. 350; *Cowokochee* v. *Chapman,* 90 Okla. 121, 215 Pac. 759; *Bilby* v. *Noble,* 106 Okla. 302, 234 Pac. 198; *March* v. *Peter,* 179 Okla. 207, 64 Pac. [2d] 912; *U. S.* v. *Anglin et al.,* 145 Fed. [2d] 622, 627; *Moore* v. *Jefferson,* 190 Okla. 67, 120 Pac. [2d] 983; *In re Micco's Estate,* 59 Fed. Supp. 434), but where the decedent leaves a will, administration proceedings are necessary, and there could be a partition proceeding in the County Court in the administration proceeding (*U. S.* v. *Bond, supra; Tucker* v. *Masters,* 97 Okla. 70, 222 Pac. 259; *Hatcher et al.* v. *Wade's Estate,* 180 Okla. 646, 71 Pac. [2d] 962). It was necessary that there be a final decree of distribution before the County Court could be divested of jurisdiction. *Gassin* v. *McJunkin,* 173 Okla. 210, 48 Pac. (2d) 320. So, all proceedings in the partition suit in the District Court of Pontotoc County, Oklahoma, were void for lack of jurisdiction of the subject matter in the court. The judgment in that case, and partition pro-

ceedings, and sheriff's deed based thereon are subject to collateral attack. It was held in the case of *Grisso* v. *U. S.*, 138 Fed. (2d) 996, 1000, that in directing a sale of restricted Indian land, in a partition proceeding, a state court acts in part as a Federal agency, and that in such a proceeding, the facts essential to the exertion of the jurisdiction of the court must affirmatively appear in the record. Furthermore, the defendants in this case stipulated to facts showing the judgment in the partition suit was void, and showing that the District Court of Pontotoc County, Oklahoma, had no jurisdiction of the subject matter (R. 50, 55, 73), and the judgment and proceedings therein are subject to collateral attack under the rule applied in *Silmon* v. *Rahhal*, 178 Okla. 244, 62 Pac. (2d) 501. The opinion and decision of the Court of Appeals did not determine whether the sheriff's deed was void or not.

Third Proposition.

The Court of Appeals erred in not reversing the judgment of the District Court with directions to render judgment for plaintiffs.

This follows if the foregoing contentions are correct.

CONCLUSION

It is respectfully submitted that the questions involved in this case are such as to justify this Court in granting a writ of certiorari to the United States Court of Appeals

for the Tenth Circuit, in order that its opinion and decision in said case may be reviewed, and that this Court should review such decision and reverse it.

Respectfully submitted,

JAMES W. BOUNDS,
Hugo, Oklahoma,

Counsel for Petitioners.

Of Counsel:
TURNER M. KING,
CARLOSS WADLINGTON,
Ada, Oklahoma.

APPENDIX

United States Court of Appeals

TENTH CIRCUIT

No. 3740—NOVEMBER TERM, 1948.

Eula Wolfe, *nee* Perry; Salina Scott, Lena McLane, now Clark; and Mary Walker, *nee* Scott, *Appellants*,

v.

Oren Phillips and Janie Phillips, his wife; Harry H. Diamond, Incorporated, a corporation; Walter Mayer; and Bruno Mayer, *Appellees*.

Appeal from the United States District Court for the Eastern District of Oklahoma.

[January 27, 1949.]

Carloss Wadlington (Turner M. King was with him on the briefs) for appellants.

Jack T. Conn (Kerr, Lambert, Conn & Roberts were with him on the brief) for Oren Phillips and Janie Phillips.

Thompson & Braly were on the brief for Walter Mayer and Bruno Mayer.

Roff & Roberts were on the brief for Harry H. Diamond, Inc.

Before PHILLIPS, Chief Judge, and BRATTON and HUXMAN, Circuit Judges.

PHILLIPS, Chief Judge, delivered the opinion of the court.

[APPENDIX]

Eula Wolfe, *nee* Perry, Salina Scott, Lena McLane, now Clark, and Mary Walker, *nee* Scott,[1] brought this action against Oren and Janie Phillips, Harry H. Diamond, Inc., and Walter and Bruno Mayer to recover possession of a tract of land situated in Pontotoc County, Oklahoma, to quiet title thereto, and for an accounting of rents and profits.

The action was originally commenced in the district court of Pontotoc County. Notice of the pendency of the action was served upon the Superintendent for the Five Civilized Tribes and it was removed by the United States to the United States District Court for the Eastern District of Oklahoma, in accordance with the Act of Congress of April 12, 1926.[2] Thereafter, the United States filed a complaint in intervention. Before the case came on for hearing, the United States, with leave of court, withdrew its complaint in intervention.

The tract of land embraces 130 acres allotted and patented to Mollie McLane, *nee* Henderson, a full-blood Chickasaw Indian, enrolled opposite Roll No. 1061, as her homestead allotment.

The parties stipulated the following facts, in addition to those above stated:

A tax exemption certificate was duly executed and approved by the Secretary of the Interior and filed for record in the office of the county clerk of Pontotoc County, November 21, 1930. It was filed also in the office of the Superintendent for the Five Civilized Tribes. Such land remained tax exempt and restricted during the life of the allottee, Mollie McLane.

Mollie McLane died testate, while a resident of Pontotoc County, on February 9, 1935. Her will was duly admitted to probate by the county court of Pontotoc County,

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1 Hereinafter called plaintiffs.

2 44 Stat. 239.

on August 31, 1935. By her will, such land was devised to her husband, Ainusiah McLane, and to her sons, George and King McLane, in equal shares. Each of the devisees was a Chickasaw Indian of full-blood.

Ainusiah McLane died testate, while a resident of Pontotoc County, on April 22, 1935. His will was duly admitted to probate by the county court of Pontotoc County, February 11, 1936. By such will, he devised his undivided one-third interest in such land to Mary Walker, *nee* Scott, a Chickasaw Indian of three-fourths blood, enrolled opposite Roll No. 1062.

On January 6, 1936, Mary Walker executed a mineral deed purporting to convey to the Mayers an undivided one-sixth interest in the minerals lying in and under such land. That deed was not approved by any county court nor by the Secretary of the Interior.

On May 8, 1936, the district court of Pontotoc County in a cause in which Mary Walker and King McLane were plaintiffs, and George McLane, a minor, was defendant, entered judgment for the partition of such land. The Mayers were not parties to the partition action. Notice of the pendency of the partition suit was not served upon the Superintendent for the Five Civilized Tribes and the United States was not made a party thereto. Pursuant to the order of the district court of Pontotoc County, entered in such partition proceeding, such land was sold at partition sale and a sheriff's deed executed in favor of C. Rounsavall, on November 25, 1936. Such deed was filed for record in the office of the county clerk of Pontotoc County, on November 25, 1936, and recorded in Book 220, at page 203.

On August 6, 1942, C. Rounsavall executed and delivered to Oren and Janie Phillips a warranty deed purporting to convey to them the entire estate in such land.

[APPENDIX]

On September 26, 1940, King McLane died intestate, leaving as his surviving heirs-at-law, Lena McLane, George McLane, Mary Walker, Salina Scott, and Beulah Scott. On January 25, 1941, George McLane died intestate, leaving surviving as his heirs-at-law, Mary Walker, Salina Scott, and Beulah Scott. On October 3, 1942, Beulah Scott died intestate, leaving surviving as her sole heir-at-law, Eula Wolfe, *nee* Perry.

Eula Wolfe, *nee* Perry, is a Chickasaw Indian of the full-blood; enrolled opposite Roll No. 318. Salina Scott is an unenrolled Chickasaw Indian of seven-eighths blood. Beulah Scott was an unenrolled Chickasaw Indian of seven-eighths blood. Lena McLane is an unenrolled Chickasaw Indian of three-fourths blood.

In addition to the facts stipulated, the trial court found the following facts:

That J. M. Sallee was duly appointed guardian of the person and estate of George McLane, a minor, the defendant in the partition suit, by order of the county court of Pontotoc County, November 14, 1935, and at all times during the pendency of the partition suit, Sallee was the duly qualified and acting guardian of the person and estate of such minor.

That Rounsavall, to whom the sheriff's deed was executed pursuant to the order of the district court in the partition suit, on December 7, 1936, executed a mortgage on such land to Sallee to secure a note in the principal sum of $1000, the amount paid for such land at such partition sale, and that such mortgage was filed for record in the office of the county clerk of Pontotoc County, December 8, 1936, and released August 6, 1942, when Rounsavall executed his warranty deed to Oren and Janie Phillips.

That on November 26, 1936, the district court of Pontotoc County made an order in the partition proceedings

approving the sheriff's sale and directing the execution of a sheriff's deed to Rounsavall and the distribution of the proceeds of such sale. That it directed one-third thereof to be distributed to Sallee as guardian of George McLane.

That Rounsavall was the bidder at the sheriff's partition sale; that pursuant to his bid, the sheriff's deed was issued to him; that he took possession of the land and continued in possession thereof until his conveyance to Oren and Janie Phillips on August 6, 1942.

That Harry H. Diamond, Inc., is the holder of valid and subsisting oil and gas leases on such land, one running from Oren and Janie Phillips and one running from the Mayers.

That Oren and Janie Phillips, without admitting the validity of the deed from Mary Walker to the Mayers, were willing to concede that the Mayers owned an undivided one-sixth interest in the minerals in such land.

That Oren and Janie Phillips, after acquiring the deed dated August 6, 1942, went into possession of such land and have been in possession thereof at all times since that date and were in possession of such land at the time of the trial.

The trial court concluded that 12 Okl. St. Anno. § 93, as amended by the Session Laws of Oklahoma, 1945, p. 37, § 1, was applicable to the plaintiffs in the instant case by virtue of § 2 of the Act of April 12, 1926,[3] and barred them

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[3] Section 2 of the Act of April 12, 1926, 44 Stat. 239, 240, provides:

"The statutes of limitations of the State of Oklahoma are hereby made and declared to be applicable to and shall have full force and effect against all restricted Indians of the Five Civilized Tribes, and against the heirs or grantees of any such Indians, and against all rights and causes of action heretofore accrued or hereafter accruing to any such Indians or their heirs or grantees, to the same extent and effect and in the same manner as in the case of any other citizen of the State of Oklahoma, and may be pleaded in bar of any action brought by or on behalf of any such Indian, his or her grantees, either in his own behalf or by the Government of the United States, or by any other party for his or her benefit, to the same extent as though such action were brought by or on behalf of any other citizen of said State: Provided, That no cause of action

from asserting any right, title, or interest in or to such land adverse to the claims of the defendants.

By its judgment, the trial court adjudged that Oren and Janie Phillips were the owners of the surface rights in such land and of an undivided five-sixths interest in the minerals therein; that the Mayers were the owners of an undivided one-sixth interest in the minerals in such land; quieted the title of such owners against the plaintiffs; and adjudged that such land was subject to valid oil and gas mining leases in favor of Harry H. Diamond, Inc. The plaintiffs have appealed.

It will be observed that § 2 of the Act of April 12, 1926, set out in Note 3, provides that the statutes of limitations of the State of Oklahoma shall be applicable to and shall have full force and effect against all restricted Indians

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which heretofore shall have accrued to any such Indian shall be barred prior to the expiration of a period of two years from and after the approval of this Act, even though the full statutory period of limitation shall already have run or shall expire during said two years' period, and any such restricted Indian, if competent to sue, or his guardian, or the United States in his behalf, may sue upon any such cause of action during such two years' period free from any bar of the statutes of limitations."

12 Okl. St. Anno., Sec. 93, as amended by the Session Laws of Oklahoma, 1945, page 37, Sec. 1, in part reads:

"Actions for the recovery of real property, or for the determination of any adverse right or interest therein, can only be brought within the periods hereinafter prescribed, after the cause of action shall have accrued, and at no time thereafter;

"(1) An action for the recovery of real property sold on execution or for the recovery of real estate partitioned by judgment in kind, or sold, or conveyed pursuant to partition proceedings, or other judicial sale, when brought by, or on behalf of, the execution debtor or former owner or his or their heirs, or any person claiming under him or them by title acquired after the date of the judgment within five (5) years after the date of the recording of the deed made in pursuance of the sale or proceeding, or within five (5) years after the date of the entry of the final judgment of partition in kind where no sale is had in the partition proceedings; provided, however, that where any such action pertains to real estate sold, conveyed or partitioned by judgment, pursuant to partition proceedings, or by other judicial sale, and would at the passage of this Act be barred by the terms hereof, such action may be brought within one (1) year after the passage of this Act; * * * "

Before the amendment of 1945, the applicable limitation period for recovery of real estate sold or conveyed pursuant to partition proceedings was 15 years. See original Section 93 before amendment of 1945.

of the Five Civilized Tribes and against their heirs or grantees, to the same extent and effect and in the same manner as in the case of any other citizen of the State of Oklahoma, and may be pleaded in bar of any action brought by any such Indian, his heirs or grantees, or by the United States or any other party for the benefit of such Indian, his heirs or grantees, to the same extent as though such action were brought by or on behalf of any other citizen of such state.

It seems to us that the manifest intent and purpose of such § 2 was to make the statutes of limitations of the State of Oklahoma applicable to Indians of the Five Civilized Tribes, their heirs or grantees, in such a way that when a plea of limitations should be set up against an action brought by any such Indians, his heirs or grantees, or brought by the United States or any other party in his or their behalf, the result would be the same as it would be if such Indian, heir, or grantee were a non-Indian citizen of Oklahoma. Such intent and purpose would not be accomplished if such § 2 were construed to make applicable to such Indians, their heirs or grantees, only the statutes of limitations of the State of Oklahoma in force at the time of the enactment by Congress of such § 2 and not to make applicable the statutes of limitations of the State of Oklahoma as thereafter amended, modified, or supplemented by future legislative enactments.

By such § 2, Congress did not by reference adopt the statutes of limitations of the State of Oklahoma as Federal law. What it did was to consent and provide that restricted Indians of the Five Civilized Tribes, their heirs or grantees, should be subject to the statutes of limitations of the State of Oklahoma as state law.[4] Congress did not

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4 Comparable statutes have been so construed. See **Stewart v. Keyes**, 295 U. S. 403, 415 (dealing with Section 6 of the Act of May 27, 1908, 35 Stat. 312, 313); **Jackson v. Harris**, 10 Cir. 43 F. 2d 513, 516, and **Sockey v. Ellis**, 112 Okl. 116, 240 P. 87, 88 (dealing with Section 9 of the Act of May 27, 1908, 35 Stat. 312, 315).

intend that such state law should be static. Rather, it intended to consent and provide that the statutes of limitations of the State of Oklahoma as then in force and as they should thereafter be amended, modified or supplemented should be applicable to such restricted Indians, their heirs or grantees. Otherwise, such statutes would not be applicable to such Indians, their heirs or grantees, to the same extent and effect as in the case of any other citizen of Oklahoma, or to the same extent as though such action were brought by or on behalf of any other citizen of Oklahoma; that because if such § 2 were construed to make applicable only the statutes of limitations of the State of Oklahoma in force at the time of its enactment and the statutes of limitations of the State of Oklahoma were thereafter amended, modified, or supplemented, one statute of limitations would apply to restricted Indians and another statute of limitations would apply to other citizens of such state.

Since such § 2 made the statutes of limitations of the State of Oklahoma applicable to Indians of the Five Civilized Tribes, their heirs or grantees, as state law, and did not adopt such statutes of limitations as Federal law, no question of unconstitutional delegation of legislative power by Congress is involved.

The power of Congress to legislate with respect to its Indian wards is paramount and plenary[5] and there can be no doubt of its power to enact such § 2 as we have construed it.

A state may constitutionally shorten the periods of limitation by previously existing statutes and make the

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5 **Winton v. Amos**, 255 U. S. 373, 391;
Sizemore v. Brady, 235 U. S. 441, 449;
Lone Wolf v. Hitchcock, 187 U. S. 553, 565;
Williams v. Johnson, 239 U. S. 414, 420;
Taylor v. Tayrien, 10 Cir., 51 F. 2d 885, 887, and cases there cited;
McElroy v. Pegg, 10 Cir., 167 F. 2d 668, 671;
Mashunkashey v. Mashunkashey, —— Okl. ——, 134 P. 2d 976, 978-979.

amended statute applicable to existing causes of action, provided it affords a reasonable time within which suits for such existing causes of action may be commenced.[6] What is a reasonable time is for the determination of the Legislature and the court will not interfere with the legislative discretion, unless time allowed is so manifestly insufficient that it amounts to a denial of justice.[7] Section 93, as amended, set out in Note 3, provided "that where any such action pertains to real estate sold, * * * pursuant to partition proceedings, * * * and would at the passage of this Act be barred by the terms hereof, such action may be brought within one (1) year after the passage of this Act."

The action brought by Plaintiffs would have been barred on November 25, 1941, by the terms of the amendatory act. Plaintiffs, therefore, had one year from the date of the passage of the amendatory act within which to bring this action. One year afforded plaintiffs full opportunity for resort to the courts for the enforcement of the right upon which the limitation was intended to operate and was a reasonable time.

The five-year period of limitation fixed by § 93, as amended, began to run upon the recording of the deed to Rounsavall on November 25, 1936, and the instant action became barred on November 25, 1941, irrespective of whether such deed was valid or void.[8] Therefore, we find it unnecessary to determine the conflicting contentions of the parties with respect to the validity of such deed.

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6 **Wheeler v. Jackson,** 137 U. S. 245, 255;
Turner v. New York, 168 U. S. 90, 94;
United States v. Morena, 245 U. S. 392, 397;
Atchafalaya Land Co. v. Williams Cypress Co., 258 U. S. 190, 196-197;
Meyer v. City of Eufaula, 10 Cir. 154 F. 2d 943, 946.

7 **Wilson v. Iseminger,** 185 U. S. 55, 63;
Terry v. Anderson, 95 U. S. 628, 633;
McGahay v. Virginia, 135 U. S. 662, 705.

8 **Stewart v. Keyes,** —— Okl. ——, 30 P. 2d 875, 877.

Likewise, since Oren and Janie Phillips, without admitting the validity of the mineral deed from Mary Walker to the Mayers, consented that the Mayers might be adjudged to be the owners of a one-sixth interest in the minerals in such land, we deem it unnecessary to pass on the validity of that deed.

Plaintiffs contend that the court erred in not making a finding as to whether Sallee, the guardian of George McLane, was the bidder for and real purchaser of the land at the partition sale and erred in refusing to reopen the case to permit the plaintiffs to introduce further evidence on that issue.

In their amended petition, plaintiffs alleged that at the partition sale, Sallee was the only bidder; that he made a bid of $1000 in the name of Rounsavall; that Sallee was "the actual bidder and purchaser" at such sale; that the Sheriff's deed was taken in the name of Rounsavall at the request of Sallee; and that Rounsavall took the title to the land for the use and benefit of Sallee.

In their answer, Oren and Janie Phillips denied those allegations and alleged in the alternative that if such allegations were true, they were purchasers of the land for value and without notice. Harry H. Diamond, Inc., affirmatively alleged that Rounsavall was the purchaser at such partition sale.

On the issues thus presented, the court found:

> "One of the contentions of the plaintiffs * * * was that * * * Sallee * * * was in fact the purchaser of said lands at the sheriff's sale; that he was the only bidder at said sale and that although the deed was taken in the name of * * * Rounsavall, * * * Sallee was in truth and in fact the purchaser. On this issue I find against the contentions of the plaintiffs. I find from the evidence that * * * Rounsavall was the bidder at said sale, and that pursuant to his bid, the Sheriff's deed

was issued to him; that he took possession of said lands and continued in possession until the date, he h[s]old the lands to Phillips on August 6th, 1942."

The evidence affords substantial support for the finding of the trial court and it is not clearly erroneous. It is, therefore, binding on this court.

In their motion to reopen the case, plaintiffs stated they desired to take the deposition of Rounsavall and introduce it at a future hearing; and that if Rounsavall's testimony were taken, he would testify that Sallee furnished the money for the purchase of the land at the partition sale, and was the actual purchaser of the land, and further stated that they were surprised at the testimony of Lambert, a witness called by the defendants, to the effect that Rounsavall was the bidder and purchaser at such sale.

The record discloses that on April 2, 1948, plaintiffs gave notice that on April 8, 1948, they would take the deposition of Rounsavall and others at Stonewall, Oklahoma; that Rounsavall appeared pursuant to notice; and that plaintiffs had full opportunity to take his deposition, but failed so to do.

Plaintiffs knew that their allegation that Sallee was the bidder and purchaser at the partition sale was denied in the answers. Notwithstanding that, they failed to take the deposition of Rounsavall. Such being the facts, we cannot say that the trial court abused its discretion in refusing to reopen the case.[9]

The judgment is AFFIRMED.

A true copy.

Attest:

Clerk, United States Court of Appeals, Tenth Circuit.

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[9] **Render v. Arkansas Valley Trust Co.**, 8 Cir., 196 F. 1, 4; **Postal Telegraph-Cable Co. v. Northern Pacific Ry. Co.**, 9 Cir., 211 F. 824, 827.